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9 IN THE UNITED STATES DISTRICT COURT  
10 FOR THE DISTRICT OF OREGON

11 MICHAEL ZWEBNER, )  
12 Plaintiff, ) No. CV-00-1322-HU  
13 v. )  
14 JOHN DOES ANONYMOUS )  
15 FOUNDATION, INC., a \_\_\_\_\_ ) ORDER  
16 corporation; LES FRENCH; and )  
17 Does 2 through 100, )  
Defendants. )

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25 Inc.

26 Les French  
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28 Defendant Pro Se

1 - ORDER

1 HUBEL, Magistrate Judge:

2 Plaintiff Michael Zwebner brings this tort action against  
3 defendants John Does Anonymous Foundation, Inc. (JDAF), Les  
4 French,<sup>1</sup> and Does 2 through 100. Plaintiff alleges that the  
5 JDAF, which operates and maintains an Internet bulletin board  
6 website called "JohnDoes.org," receives material from users and  
7 publishes it on the website, allowing it to be transmitted to  
8 computers around the world. Plaintiff contends that defamatory  
9 material about him has been published via this website and that  
10 he has been harmed from such action. Plaintiff brings claims  
11 for defamation, intentional infliction of emotional distress,  
12 and false light invasion of privacy. He also seeks injunctive  
13 relief.

14 Plaintiff has successfully obtained an order of default  
15 against the JDAF. Plaintiff now moves for entry of default  
16 judgment pursuant to Federal Rule of Civil Procedure 55(b). For  
17 the reasons explained below, I defer ruling on the motion for  
18 entry of default judgment until such time as the damages phase  
19 of the case against Les French, the only answering defendant.

20 I. Need for Prima Facie Hearing

21 Under Rule 55, if the plaintiff's claim is for a sum certain  
22 or for a sum which can by computation be made certain, the clerk

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23  
24 <sup>1</sup> Les French is now properly named in the caption as a  
25 result of Judge King's recent affirmance of my earlier Order  
26 allowing French to appear as a defendant in place of one of  
27 the John Does, because of the allegations made against one of  
28 French's admission that he is Internetzorro. All parties  
should now use the caption as it appears here on all future  
submissions.

1 may enter a default judgment. Fed. R. Civ. P. 55(b)(1). In all  
2 other cases, the party must apply to the court. Fed. R. Civ. P.  
3 55(b)(2). The rule provides:

4 If, in order to enable the court to enter judgment or  
5 to carry it into effect, it is necessary to take an  
6 account or to determine the amount of damages or to  
7 establish the truth of any averment by evidence or to  
8 make an investigation of any other matter, the court  
may conduct such hearings or order such references as  
it deems necessary and proper and shall accord a right  
of trial by jury to the parties when and as required  
by any statute of the United States.

9 Id. As explained by the Second Circuit, "[d]amages, which are  
10 neither susceptible of mathematical computation nor liquidated  
11 as of the default, usually must be established by the plaintiff  
12 in an evidentiary proceeding in which the defendant has the  
13 opportunity to contest the amount." Greyhound Exhibitgroup,  
14 Inc. v. E.L.U.L. Realty Corp., 973 F.2d 155, 157 (2d Cir. 1992).

15  
16 Although in some cases a court may award unliquidated  
17 damages on the basis of detailed affidavit testimony alone, see  
18 United Artists Corp. v. Freeman, 605 F.2d 854, 857 (5th Cir.  
19 1979) (damages for default judgment should not have been awarded  
20 without either hearing or a demonstration by detailed affidavits  
21 establishing necessary facts), Transportes Aereos De Angola v.  
22 Jet Traders Inv. Corp., 624 F. Supp. 264, 266 (D. Del. 1985)  
23 (damages for default could be established without hearing when  
24 party presented definite figures in documentary evidence or  
25 detailed affidavits), the court retains great discretion in  
26 determining whether to conduct a hearing to assess damages upon  
27 default. See Televideo Sys., Inc. v. Heidenthal, 826 F.2d 915,  
28 917 (9th Cir. 1987) ("Rule 55 gives the court considerable

1 leeway as to what it may require as a prerequisite to the entry  
2 of a default judgment." ).

3 While plaintiff has submitted affidavits in support of his  
4 damages claim, I prefer to conduct an in-person prima facie  
5 hearing for several reasons. First, as discussed during the  
6 March 28, 2001 hearing on the issue of a prima facie hearing,  
7 there are questions of law which must be addressed before I can  
8 conclude that plaintiff is entitled to judgment on the asserted  
9 claims. Argument from counsel at a prima facie hearing would  
10 assist me in resolving those questions of law. Second, given  
11 the amount of damages sought by plaintiff, over \$18 million, I  
12 prefer to evaluate plaintiff's testimony in person with the  
13 opportunity to inquire of plaintiff if needed.

14 Third, although I have not yet reached a conclusion as to  
15 the level of the JDAF's participation in the prima facie  
16 hearing, I anticipate that at a minimum, the JDAF will be able  
17 to cross-examine plaintiff's witnesses and object to plaintiff's  
18 evidence. See, e.g., Howard v. Holiday Inns, Inc., 271 S.C.  
19 238, 241, 246 S.E.2d 880, 882 (1978) (defaulted defendant can  
20 participate in proceedings relative to the assessment of  
21 damages, but only to the extent of cross-examination and  
22 objection to plaintiff's evidence; expressly rejecting  
23 assessment of damages at ex parte hearing at which only the  
24 plaintiff would appear and a full adversary contest in which the  
25 defaulted party could produce its own evidence in rebuttal or  
26 mitigation); see also Bonilla v. Trebol Motors Corp., 150 F.3d  
27 77, 82 (1st Cir. 1998) ("ordinary rule is that a defaulting  
28 defendant is entitled to contest damages and to participate in

1 a hearing on damages, should one be held."), cert. denied, 526  
2 U.S. 1098 (1999). Given the JDAF's right to participate, at  
3 least at some level, in the assessment of damages, a prima facie  
4 hearing is the most convenient means of affording the JDAF that  
5 opportunity.

6 Based on these factors, I determine that a prima facie  
7 hearing on the requested damages to be assessed against the JDAF  
8 is in the parties' and the Court's best interests.

## 9 II. Timing of Prima Facie Hearing

10 Plaintiff seeks resolution of the default judgment motion  
11 and the assessment of damages against the JDAF as soon as  
12 practicable. The JDAF argues that it must be deferred until  
13 later in the case. I agree with the JDAF.

14 Courts from across the country have consistently held that  
15 "it is appropriate to enter judgment solely as to liability and  
16 not as to the amount of damages to be assessed against the  
17 defaulting party, since a separate determination of damages  
18 would pose the prospect of inconsistent judgments." Anita's New  
19 Mexico Style Mexican Food v. Anita's Mexican Foods Corp., No.  
20 Civ. A. 97-510-A, 1998 WL 526770 (E.D. Va. 1998) (citing  
21 Pfanenstiel Architects, Inc. v. Chouteau Petroleum Co., 978 F.2d  
22 430, 433 (8th Cir. 1992); Hunt v. Inter-Globe Energy, Inc., 770  
23 F.2d 145, 147-48 (10th Cir. 1985); Dundee Cement Co. v. Howard  
24 Pipes & Concrete Prod., Inc., 722 F.2d 1319, 1324 (7th Cir.  
25 1983)); see also Montcalm Pub. Corp. v. Ryan, 807 F. Supp. 975,  
26 977-78 (S.D.N.Y. 1992) (damages judgment against defaulting  
27 defendants premature since they allegedly were jointly and  
28 severally liable with nondefaulting defendants; proper procedure

1 was to consolidate the inquest to determine the level of damages  
2 as to the defaulting defendants with the damages aspect of the  
3 trial against the nondefaulting defendants).

4 The lead case is Frow v. De La Vega, 82 U.S. 552 (1872).  
5 Plaintiff argues that its holding does not apply here because it  
6 applies only in cases where there is true joint liability, not  
7 joint and several liability. Plaintiff cites In re: Uranium  
8 Antitrust Litigation, 617 F.2d 1248 (7th Cir. 1980) in support  
9 of his argument. There, the court held that Frow did not  
10 preclude the entry of a default judgment against the defaulted  
11 parties before the adjudication on the merits of the claims as  
12 to the remaining defendants, where liability was joint and  
13 several. Id. at 1258.

14 A close reading of the case, however, shows that the default  
15 judgment at issue in that discussion was only a judgment as to  
16 liability. Later in the Opinion, the court tackles the issue of  
17 the timing of the hearing on damages. It notes that when joint  
18 and several liability is asserted on a claim, a problem of  
19 "possible inconsistency" could arise because there could be "two  
20 distinct damages awards[.]" Id. at 1262. As explained by the  
21 court: "[j]ust as the several or independent nature of  
22 plaintiff's claim permits different findings as to liability of  
23 individual defendants, the joint nature of plaintiffs' claim  
24 prohibits different findings as to damages against all  
25 defendants." Id. Thus, the court held, while "[the plaintiff]  
26 has secured a valid default judgment as to the defaulters'  
27 liability, a damages hearing may not be held until the liability  
28 of each defendant has been resolved." Id. If liability is

1 found against the answering defendants, then "a single damages  
2 hearing can be held." Id.

3 Although I found no Ninth Circuit cases interpreting Frow,  
4 the persuasive authority from other circuit and district courts  
5 leads me to conclude that, in this case, where joint and several  
6 liability is alleged,<sup>2</sup> a risk of inconsistent results exists and  
7 thus, the prima facie hearing on plaintiff's motion for default  
8 judgment against the JDAF should be deferred until the liability  
9 of French has been determined.

10 CONCLUSION

11 Plaintiff's motion for default judgment (#18) is deferred  
12 until the damages phase of the case against French.

13 IT IS SO ORDERED.

14  
15 Dated this 13th day of April, 2001.

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18 \_\_\_\_\_/s/

19 Dennis James Hubel  
20 United States Magistrate Judge  
21  
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23 \_\_\_\_\_

24 <sup>2</sup> Although there are no express allegations of joint and  
25 several liability, the allegations in the Complaint suggest  
26 that joint and several liability is asserted. See, e.g.,  
27 Compl. at ¶ 5 (alleging that the John Does and the JDAF acted  
28 in concert). Additionally, references to defendants are in  
the plural throughout the Complaint. Finally, in the March  
28, 2001 hearing, plaintiff's counsel indicated that this is a  
case of joint and several liability.